THE NOTARY IN AMERICAN LEGAL HISTORY: THE FALL AND RISE OF THE CIVIL LAW TRADITION?

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This essay does not deal with the historiography of the notarial profession in North America nor with the methodology of the research simply because there is virtually no prior historiography or research in that regard. Thus the essay just tells the story itself and proffers some explanations for the rise, fall, and (partial) re-rise of the civil law notary in America.

Introduction: A *Notary* in What Sense?

A history of the notarial profession in the United States must confront a fundamental issue of definition: What do we mean by a "notary"? In the various Western languages, we have a fairly common term, or at least a common set of terms all derived from the same Latin root ("notare" - to write down, to stamp, to mark): notary, *Notar*, *notaire*, *notaio*, *notario*, etc. Still, as is well understood among comparatists, these terms can stand for very different creatures. The traditions, educational requirements, professional roles, public regulations, and legal powers of "notaries" have differed considerably across both time and space - which is, after all, the whole point of this volume.

While there are some differences among the various notarial professions in the countries of the world, they are particularly pronounced between the civil and the common law traditions. It is a staple of modern comparative law that the notary found in almost all civil law systems does not exist in the common law orbit. Indeed, the notary is often considered one of the defining features of the civil law culture[1]. While all such generalizations must be taken with a grain of salt, today, the civil law notary can be defined by four major criteria. First, he or she is a specially trained legal professional (usually with a university law degree) in private practice who deals with non-contentious matters such as counseling, drafting, and authenticating documents. As such, he or she is a nonpartisan advisor to the parties and, at least in an implicit sense, "the judge of the legality of the transaction"[2]. Second, the civil law notary is vested by the state with the often exclusive power to authenticate certain documents, i.e., to turn them into "public acts" (to provide them with *publica fides*). This not only ensures compliance with the requisite formalities, it also establishes proof of what the parties said and did before the notary; the evidentiary effect of such notarial documents in court is near-conclusive or at least very difficult to rebut. Third, the notary has exclusive jurisdiction in the district to which he or she (together with a limited number of colleagues) is assigned; this entails a duty not to refuse service to anyone without a good reason. In this sense, the notary operates, again, almost like public official. Fourth, the notary has a duty to keep records of the transactions he or she authenticated and to provide interested parties with copies, thus serving as a depository in the public interest. As a result of all this, the civil law notary enjoys a prestige of person and profession derived from his function to bridge the gap between the state and private actors under civil law. With this prestige comes a restriction in numbers[3]. In all these regards, the notary is a member of an elite profession.

This kind of notary does not exist in the common law orbit. To be sure, the claim that "any similarity between the civil law notary and the notary public in common law countries is only

[1]See Mary Ann Glendon, Michael Gordon and Paolo Carozza, Comparative Legal Traditions (St. Paul/MN 2d. ed. 1999) 81; John H. Merryman, The Civil Law Tradition (Stanford 3d ed. 2007) 106-107; Konrad Zweigert and Hein Kötz, Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts (Tübingen 3d ed. 1996) 361. See also Pedro Malavet, Counsel for the Situation: The Latin Notary - A Historical and Comparative Model, 19 Hastings International and Comparative Law Review 389 (1996).

[2]Malavet, supra note 1, at 402.

[3]See infra. note 14.

superficial"[4] is dangerously overbroad. After all, at least the English notary public (as well as his counterpart in Australia and New Zealand) shares several important features with his civilian colleagues[5]. But the statement is eminently true with regard to the "notary public" in the United States today[6]. Again, there is considerable variation among the several US-American jurisdictions regulating the matter, but almost everywhere, US-American notaries public are very different from civil law notaries[7]. First, they are *not* highly trained legal professionals. As a rule, any person over eighteen years of age who can read and write English (and is not a convicted felon)[8] can, upon paying a small fee and taking an oath, become a notary public by appointment; such a "commission" is given for a term of typically four or five years. This requires either very little training (of perhaps a few hours of coursework) or none at all; most states do not require an exam either, and where they do, it can be passed after memorizing a small booklet and is almost "analogous to a driver's license test"[9]. Since such a notary public has no substantial legal training, he or she cannot provide legal advice or draft legal documents for remuneration (in fact, doing so would entail liability for practicing law without a license). Second, the US-American notary public has very limited power to authenticate anything. It is true that he or she is "a public officer, whose function is the attestation and certification of certain documents for the purpose of establishing their legal authenticity"[10]. Yet, all he or she can really do with regard to documents is take an "acknowledgment", i.e., certify that a person who identified himself or herself to the notary, executed a signature (typically in the notary's presence) and thus voluntarily put the document into effect[11]. A US-American notary public cannot provide the document with any *publica fides* regarding its substance[12]. Third, these notaries are not assigned to a particular

[4]Merryman, supra fn. 1, 106.

[5]Among these features are specialized training and professional status, work with documents embodying (mostly commercial) transactions, and the function to authenticate them (usually for use abroad). The English notary, however, normally does not advise clients on the underlying transactions nor does he have the power to provide documents with *publica fides*; see C.W. Brooks, R.H. Helmholz and P.G. Stein, Notaries Public in England since the Reformation (London 1991) 136-141. He or she thus stands half-way, so to speak, between his continental colleagues and his US-American namesake to whom we shall promptly turn.

[6]This is generally acknowledged in the comparative law literature; see Zweigert and Kötz, supra note 1; Renè David, Major Legal Systems in the World Today (J. Brierley transl., 2d ed. New York 1985) 399; Rudolf Schlesinger, Hans Baade, Peter Herzog and Edward Wise, Comparative Law (New York 6th ed. 1998) 25; Peter Hay, Law of the United States (München 2d ed. 2005) 255 (fn. 283); Malavet, supra note 1.

[7]See Michael Closen et al., Notary Law and Practice. Cases and Materials (National Notary Association, Chatsworth/CA 1997). The basic rules are summarized in the Model Notary Act of 1984, reprinted id. 509-527. We leave out here, for the moment, the situation in Louisiana. In Louisiana as a mixed civil/common law jurisdiction, the development of notaries took a path different from the rest of the United States; see infra. II.4. This is also true for the Commonwealth of Puerto Rico which is not a US state but in at least some regards part of the US legal system.

[8]United States citizenship is not required although notaries must be in the United States legally, see Bernal v. Fainter, 476 U.S. 216 (1984).

[9]Malavet, supra note 1, 467. There are states requiring both some education and a test (such as California) while others require no training but impose an examination (New York); many other states require neither.

[10]American Society of Notaries, Michigan Notary Manual (3d ed. Talahassee/FL 1996) § 2.1.

[11]Michigan Notary Manual, supra note 10, § 4.1.

[12]He can, however, also administer oaths (e.g., of office); and he can even take affidavits and depositions (sworn statements) for a variety of purposes although that is rarely done since it requires particular knowledge. A US-American notary public can also, like his or her English colleague, "[d]emand acceptance of bills of exchange, and

district and do not enjoy the quasi-monopoly of the civil law notary. Finally, US-American notaries public do not archive the originals of the documents they deal with. In some states, they have to keep a record book (a register of the official acts they perform) but in others, not even that is required[13]. In summary, to be a notary public is not a prestigious profession and certainly not, as in the civilian tradition, an exclusive status[14]. It is an essentially clerical job performed for a modest fee. While there are people who make a living that way, most of the notaries public perform their acts on a part-time basis or simply in the course of their employment as bank clerks, public employees or secretaries[15].

This dichotomy between the civil law notary and the U.S.-American notary public raises a basic question when it comes to writing a history of the notarial profession in America: whose history does one write? That of the civilian, exclusive and prestigious, legal professional or that of the American, dime-a-dozen and low status, performer of clerical acts?

Here, the answer is in favor of the civil law notary, mainly because tracing the history of the American notary public would make little sense. The problem is not only that it would it be difficult to write and boring to read[16]. More importantly, it would - like a history of the American county clerk - not really connect with the notaries in the other countries represented in this volume or, for that matter, anywhere else in the world. Like an automotive engineer and a gas station attendant, the civilian notary and the American notary public are simply too different to make a comparison of their histories meaningful.

At first glance, focusing on the American history of the civil law notary[17] may seem somewhat quixotic - after all, have we not just admitted that, with the exception of Louisiana, such a notary

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of promissory notes, and to protest the same for non-acceptance or non-payment", Michigan Notary Manual, supra note 10, § 2.10., although, again, in most states, this power is rarely used.

[13]Some states also require that notaries public post bond, i.e., provide insurance for malpractice claims, see, e.g., Michigan Notary Public Act Sec. 13 (Michigan Compiled Laws 53.273) (2003).

[14]According to the website of the *National Notary Association*, there are 4.5 million notaries public in the United States, see http://www.nationalnotary.org (last visited August 6, 2007) for a population of roughly 300 million, i.e., one notary public for every 66 inhabitants. In France, there are about 7,500 notaries for a population of ca. 60 million, i.e., notary for every 8,000 people. In Italy and Spain, the ratio is even lower; see Malavet, supra note 1, 474. As a result, in the United States there are many times more notaries public than lawyers while in continental Europe there are many times more lawyers than notaries.

[15]US-American notaries public have various professional organizations, such as the *American Society of Notaries*, the *United States Notary Association*, and the *National Notary Association*; all have their own websites. They also participate in the common American obsession with designating certain dates to certain causes: November 7 is *National Notary Public Day* and the week containing that date is *National Notary Public Week*; see Michigan Notary Manual, supra note 10, 2.

[16]There seems to be almost no material to build on; at least the general works on American legal history do not discuss the notary public. Thus one would have to research the matter state-by-state on the basis of original records. In the end, one would probably just chronicle the development of a distinctly unexciting job with negligible impact on the legal system. For a very brief historical sketch (with an emphasis on California) see Closen et al., supra note 7, 2-10.

[17]To be sure, as we will see, the American notary public plays a role in this history as well but he is not at center stage.

does not exist in the United States? Closer inspection, however, reveals that the story is more complicated than that. In fact, there once were, to some extent continue to be, and are now again such notaries in American lands. Their history is worth telling, not only because it is interesting in its own right but also because it provides valuable comparative perspectives.

The American story of the civil law notary is a play in three acts. The first act takes place in the colonial era. At that time, European nations with civil law systems - especially Spain and France, but also the Netherlands - ruled parts of what is today the United States. This brought notaries of various kinds to American shores, primarily in the sixteenth through eighteenth centuries (chapter I.). The second act is staged in the nineteenth century. When the United States expanded to the South and West and thus wiped out the foreign colonies, the civilian notary disappeared. Since the English notary did not take his place, all that was left was the American notary public. Only Louisiana took a different course (chapter II). The final act brings us all the way to the present. In the last decade, the civil law notary has made an unexpected re-appearance in some parts of the United States and in a peculiar context (chapter III). This waxing and waning (and waxing) of the civil law notary on American soil illustrates how closely this institution is tied to the civil law tradition - and how fundamentally at odds it is with the common law culture, especially in the United States (chapter IV).

I. The Colonial Era: Enter the Notary

The colonization of America began with a notarial act: when Christopher Columbus set foot on the shores of the Bahama island he named *San Salvador* on October 12, 1492, he summoned, among others, Rodrigo de Escobedo, the notary of the Armada, to witness his taking possession of the land and to prepare the necessary legal documents[18]. At least so the story goes[19].

Notaries were common in fifteenth and sixteenth-century Spain, France, the Netherlands, and other European countries, and they came with the conquerors and settlers to the New World, especially to Florida, Louisiana, and the Southwest but also to present-day New York and Quebec[20]. To be sure, we must be careful not to assume that they were exactly like civil law

[18]It was, or rather: became, common usage to take possession of newly discovered land by notarial act, just as the official foundations of the early cities in the Spanish colonies often occurred in the form of notarial documents, see Thomas Duve, Geschichte des Notariats und Notariatsrechts in Hispanoamerika, ch. II.1. (in this volume).

[19]I rely on Hans Hattenhauer, Europäische Rechtsgeschichte (2d ed., Heidelberg 1994) 347; so does Herbert Grziwotz, Die kaiserliche Notariatsordnung von 1512 als Spiegel der Entwicklung der euopäischen Notarrechts, in Herbert Grziwotz, Die kaiserliche Notariatsordnung von 1512 (München 1995) 35. Hattenhauer, in turn relies on Wolfgang Lautmann and Manfred Schlenke (eds.), Geschichte in Quellen vol. 3: Renaissance, Glaubenskämpfe, Absolutismus (2d ed. München 1976) 45. Of course, none of these authors or editors nor I was there. Yet, as the Italian saying goes: "Se non e vero, e ben trovato." (If it is not true, it is well invented.) Allegedly, another notary was with Columbus when he discovered Puerto Rico on his second voyage on November 19, 1493, see Salvador Brau, La Colonizacion de Puerto Rico (San Juan/PR 1969) 28.

[20]Canada lies beyond the scope of this essay. It is worth noting, however, that the civilian notary survived in Quebec, Canada's civil law-dominated province, just as he survived (at least to some extent) in Louisiana as the civil

notaries in our modern-day sense. Instead, like notaries throughout European history, they were a diverse assortment of characters. Some had studied law, others had not[21]; some were government officials, others were in private practice; some worked as full-time professional lawyers, others remained part-time practitioners of an essentially technical craft; some were not even called notaries at the time but rather "escribanos", a term reflecting their primary function to put matters in correct written form. Yet, even if they were not necessarily full-fledged civil law notaries in our current sense, they were all closer to that model than to the present-day US-American notary public: they advised their masters or clients in legal matters and drafted documents that acquired a certain evidentiary force, ranging from the conclusive to the presumptive. Thus they were, at least in a broad sense, part of the legal profession while American notaries public today are not.

1. The Spanish Colonies: Florida and the Southwest

The Spanish colonization of the American mainland began with the arrival of Juan Ponce de León on the shores of Florida in 1513. For the next 300 years, much of the southern and western parts of the North American continent were under Spanish rule. Florida was essentially a Spanish colony[22] until it was sold to the United States in 1819[23]. The American Southwest, i.e., present day California, Arizona, New Mexico, and Texas, was governed (to the extent it was governed at all) by Spain until it became part of Mexico when it attained its independence in 1821; Mexico finally lost most of that territory to the United States in the war of 1846-1848.

According to the *Siete Partidas* (1256-65), which provided the basic legal text even in the Spanish colonial era, there were two types of notaries in Spain: "First, those who draw up privileges and royal ordinances, and the judicial decisions of the palace of the king, and others who are notaries public and draw up bills of sale, purchases, contracts, and agreements which men enter into among themselves in cities and towns."[24] Thus, there was the often so-called royal notary who was essentially a government clerk, and there was the notary public who drafted documents with heightened probative value for private parties[25]. Both positions were

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law jurisdiction in the United States, see infra. II.4.; for a short sketch, see D. Barlow Burke and Jefferson Fox, The *Notaire* in North America: A Short Study of the Adaptation of a Civil Law Institution, 59 Tulane Law Review 318 (1975) 325-328. For a full history of the notarial profession in Canada, see André Vachon, Histoire du notariat canadien, 1621-1960 (Quebec, Laval 1962).

[21]Even in Germany and after the Imperial Notariat Ordinance (*Kaiserliche Notariatsordnung*) of 1512, there was a considerable variety of notaries, and a university legal education became generally required only in the nineteenth century, see Werner Schubert, Geschichte des Notariats und Notariatsrechts in Deutschland (in this volume). A piece of local history showing how academic training and full-time work became the rule in nineteenth century Hamburg is provided by Rainer Postel, Die Anfänge des hamburgischen Notariats, in Rainer Postel, Helmut Stubbe-da Luz, Die Notare (Bremen 2001) 9-15.

[22]The Spanish rule was interrupted for twenty years. In the Treaty of Paris (1763), Spain traded Florida for Havana which it had lost to the British the year before; Florida returned to Spain in 1781-1783.

[23]Florida was admitted to the Union as a state in 1845.

[24]Las Siete Partidas, Third Partida, Title XIX, Law I: What the Word Notary Means, Las Siete Partidas, vol. III (Robert Burns ed., Samuel Parsons Scott transl. 1931, reprint Philadelphia 2001) 759.

[25]In the larger context of colonial Latin America, the picture was often more complicated because there were various subcategories of notaries, varying over time and space, see Duve, supra note 18, ch. II.2.

defined and regulated in the *Siete Partidas*, albeit in different places and to different degrees[26]. In both instances, the original Spanish text used the word "escriuano", an older version of "escribano" which is generally considered the equivalent of "notary" today[27].

It seems that only the first kind of notary, or rather a variation thereof, played a significant role in the Spanish colonies on North American soil. When we meet *escribanos* there, they almost invariably appear as government officials in one form or another. As we have seen, they accompanied Columbus on his (royally chartered) voyages in the 1490s. In later centuries, they were attached to the various colonial governmental bodies, often as *escribanos de concejo*. In Florida, they played a significant role where the governor appointed a notary as one of four key officials (the other three being a treasurer, accountant, and a factor, i.e., administrator)[28]. In 1610, it was a notary who wrote the founding document for Sante Fe, the second oldest European city in America[29]. Here, the notary was part of the local government, the *Cabildo, Justicia y Regimiento de la Villa de Santa Fe*[30]. In the territory of New Mexico, the authority of the notary was combined with the function of secretary of government and war[31]. In short, the notary of this kind was part of the colonial Spanish government.

This position resulted from the Spanish type of colonialism. The royal power sought direct control over the colonies. Given the vastness of the territory and the difficulties of long-distance communication, it thus needed an extensive and well-organized administration of which the notary was an indispensible element. He was the government official on the ground who documented local proceedings, decisions or tax records so that they could be transmitted to the motherland for information and further orders[32]. He often collected revenue and at times, he also functioned as translator between the indigenous language of the local population and the official Spanish of the government[33].

Spanish governmental notaries were more than mere clerks. To be sure, they were "present at the meetings of the officials to keep the records of the proceedings" and they duly recorded everything from "the visits of the Indians to the governor, the requests of the friars, the accounts of shipwrecks, explanations, trials and disputes"[34]. But at least in many places, the notary, as perhaps the only person with any legal and administrative training within hundreds of miles, was also "an active advisor on all problems and ... could have a profound influence over

[26]Second Partida, Title IX, Law VII and Third Partida, Title XIX, Law I-XVI.

[27]See Malavet, supra note 1, 420, fn. 136.

[28]Maynard Geiger, The Franciscan Conquest of Florida (1573-1618) (Dissertation, Catholic University of America, Washington, D.C., 1937), reprinted in Spanish Borderland Sourcebook vol. 23 (The Missions of Spanish Florida, David H. Thomas ed. New York 1991), 231.

[29]John Kessell, Spain in the Southwest (Norman/OK 2002) 98.

[30]F.V. Scholes, Civil Government and Society in New Mexico in the 17th Century, 10 New Mexico Historical Review (1935) 71, 94.

[31]Scholes, supra note 30, 91.

[32]Geiger, supra note 27.

[33]Duve, supra note 18, ch. II.1.

[34]Geiger, supra note 27, 235.

administration."[35] And while notaries by and large occupied a low rank within the government hierarchy, they were at the same time persons of considerable authority vis-a-vis the local population[36]. Their training was mainly practical and usually consisted of a two- or three-year apprenticeship[37]; legal studies at a university were neither required nor common.

The presence and influence of these kinds of notaries were at their height in the seventeenth century. Later, the situation became more unclear. It seems that the service of notaries was gradually lost during the eighteenth century due to a lack of sufficiently educated candidates for the position. The job required at least elementary legal knowledge which was difficult to acquire outside the motherland, and the supply of men from there was declining. In 1792, a *Real Colegio de Escribanos* was founded in Mexico[38], By that time, however, the Spanish system of administration in the North American colonies was already breaking down, and there were repeated complaints that the government lacked legally trained officials. Governors often turned to military officers to perform the respective duties as best they could. This situation apparently prevailed for the duration of the Spanish rule[39].

Besides the government clerks, there were ecclesiastical notaries. Through its missions, the Catholic Church competed with the secular authorities in governing the Southwestern territories, and church officials employed notaries as well. In 1623, the Holy Office appointed Friar Alonso de Benavides, a Franciscan who had served with the Inquisition in Spain, to the post of commissary for New Mexico. Benavides in turn appointed Friar Pedro de Ortega "notary of the Holy Office" to assist him in his duties to investigate all offenses subject to the Inquisition's jurisdiction. Upon Benavides' arrival in Santa Fe in 1626, he proceeded to the local church together with the governor, *cabildo* (council) and the citizens, and it was his notary, Friar Pedro, who read out the edict of faith[40]. This notary also served a government, albeit an ecclesiastical one.

But what about the other type of *escribano*, the notary public in private practice? Except for a single reference to a notary-attorney (*notario procurador*) in Santa Fe in 1764, there seem to be no traces of him in the American Southwest[41]. The reasons are not clear but two explanations are plausible. One reason could be that there simply was not enough need for such notaries. The population density in the Spanish territories was extremely low; there were hardly any cities and there was not much trade either within the colonies or with the outside world. Of course, people needed to make marriage contracts and wills, occasionally sell land or donate property. But these transactions were probably not numerous enough to sustain a notary in private practice and could easily be handled by the governmental or ecclesiastical notaries on the side. Another explanation

[35]Scholes, supra note 30, 91.
[36]Duve, supra note 18, ch. II.1.
[37]Id. II.3.
[38]Id.
[39]Marc Simmons, Spanish Government in New Mexico (Albuquerque/NM 1968) 85-87.
[40]France V. Scholes, Church and State in New Mexico 1610-1650, 11 New Mexico Historical Review 145 (1936) 162-163, 175-178.
[41]Simmons, supra note note 38, 85 fn. 116.

could be that there were in fact some notaries in private practice but that we have no historical record of their work. Governments like to keep records but private parties or practitioners do so more reluctantly and sporadically. Also, given the primitive conditions as well as the later upheavals in theses territories, such as the war of 1846-48, perhaps what few records were actually kept have been lost.

There are apparently no traces of privately practicing notaries in the American Southwest under the Mexican rule (1821-1846/8) either[42]. The governmental control Mexico exercised over these areas, which lay thousands of miles from the capital, was weak, and legal institutions remained rudimentary. In Mexican California, the justices of the peace (*alcaldes*) served as notaries. They were not trained lawyers and sometimes not even fully literate. Akin to village elders, they were primarily charged with the settlement of disputes and the execution of essential administrative functions. Still, if transactions were executed before them (or elsewhere and then deposited with them), the resulting documents automatically became authenticated, a practice often used for contracts and land titles[43].

2. The French Domain: Louisiana

Louisiana presented a somewhat different situation.[44] Although the Spanish had arrived there already in the sixteenth century as well, the French took possession - also "with full notarial formality" - in 1682[45]. They named the area "Louisiana" in honor of their king and founded a colony in the early 1700s[46]. Thus it was primarily the French who established governmental institutions at the mouth of the Mississippi. In 1762, however, Louisiana was ceded to Spain which then ruled the colony until France briefly regained control in 1800. Finally, in 1803, President Thomas Jefferson acquired the territory, then comprising not only present-day Louisiana but virtually the whole middle-third of the current United States, in the famous Louisiana Purchase. Thus the vast Mississippi region became part of the young American Republic.

Probably the most important governmental body created by the French was the Superior Council, a civil and criminal tribunal with its seat in New Orleans. It was first established in 1712, made

[42]See David Langum, Law and Community on the Mexican California Frontier (Norman/Okl. and London 1987) 30-55.

[43]See Langum, supra note 41, 53.

[44]This subchapter draws heavily on the detailed and careful study by Hand Baade, Marriage Contracts in French and Spanish Louisiana: A Study in "Notarial" Jurisprudence, 53 Tulane Law Review 1 (1979).

[45]Charles O'Neill, Church and State in French Colonial Louisiana (New Haven/CT 1966) 1. A translation of the protocol prepared by the Royal Notary Jacques de La Metairie, can be found in Benjamin French, Historical Collections of Louisiana and Florida No. 2 (2d series, New York 1875) 17-27.

[46]Under the French, Louisiana had a checkered history - from quasi private property granted by Louis XIV to his financial secretary Antoine Crozat (1712) to a colony of the Company of the Indies (1717) to crown colony (1731).

permanent in 1716, and gradually evolved into a broader governmental institution[47]. One of the Council's officials was the clerk (*greffier*) and he was also the ex officio notary of the colony. He was commissioned by the king of France and eventually acquired the official title of Royal Notary[48]. This was a highly coveted office that could be sold (as in the mother country) and over which candidates sometimes fought, if need be in court[49]. The Superior Council had the power to appoint additional, non-government, notaries as necessary and sometimes did so. There clearly were notaries in early Louisiana who had no government position[50]. Outside of New Orleans, some of the major settlements had their own notaries but in the veritable hinterland, the respective military commandants of the post acted as ex officio notaries; they transmitted the acts executed before them to the clerk's office in New Orleans as the central recordkeeping authority[51]. Apparently, sometimes the local priest could act as notary as well[52].

The notaries in French Louisiana occupied a curious position. On the one hand, they were not trained lawyers and not even a learned profession in the modern sense. All an appointment required was at least twenty-five years of age, good moral character, and literacy[53]. While notaries in New Orleans had access to at least one standard French work on the profession[54], they were sometimes inexperienced and unreliable. At times, this led to problems, for example with their record keeping[55]. On the other hand, notaries were the only professionals rendering legal services to clients because the French authorities did not allow advocates in the colonies. Due to the contentious nature of their business, advocates were considered undesirable elements of discord and instability. By contrast, notaries, their business being non-contentious, promised proper regulation of legal affairs and hence legal and social peace[56]. As a result, notaries enjoyed a monopoly on the market for legal advice.

When the Spanish came to rule Louisiana in the 1760s, they eventually abolished the Superior Council and replaced it with a municipal council (*cabildo*). Still, the system under which the local government clerk (*escribano*) was also the ex officio notary of the colony continued. He is mentioned in numerous court cases and played the role of both certifier of documents and

[47]See Jerry A. Micelle, From Law Court to Local Government: Metamorphosis of the Superior Council of French Louisiana, 9 (2) Louisiana History (1968) 85-107.

[48]At least initially, the appointment as notary apparently preceded that as clerk. It is thus more accurate to say that in the early years, a notary became *greffier* rather than the other way around, see Baade, supra note 43, 11.

[49]See Henry Dart (ed.), A Lawsuit over the Right to Sell the Office of Notary in Louisiana During the French Regime, 16 The Louisiana Historical Quarterly (1933) 587.

[50]Baade, supra note 43, 12.

[51]Henry Dart, Marriage Contracts of French Colonial Louisiana, 17 Lousiana Historical Quarterly 1 (1934).

[52]Joseph McKnight, Review of Morris Arnold, Unequal Laws Unto a Savage Race, 4 Law and History Review 480 (1986)..

[53]Baade, supra note 43, 12-13.

[54]Claude-Joseph de de Ferrière, La science parfait des notaires (Paris 1771).

[55]See, for example, the ordinance issued by the French king in 1717 which responded to these problems by commanding "[t]hat all Acts and instruments executed before notaries shall be bound together in the order of date and year, placing each year separately in a cover or volume having the year upon the back." Quoted after Henry Plauché Dart, The Legal Institutions of Louisiana, 2 The Louisiana Historical Quarterly (1919) 72, 84.

[56]Baade, supra note 43, 10-11, 26. The same was true for Quebec.

archivist[57]. As before under the French rule, other notaries could be appointed as well, but in 1780, the total number of notaries for all of Louisiana was fixed at two; in 1788, a third was added. Of course, these strict numerical limitations made the office extremely valuable to their holders[58]. As before, at the remote posts the respective lieutenant governors or commandants acted as ex officio notaries; they usually executed documents with the assistance of two or three witnesses[59].

In contrast to the situation in the Spanish Southwest, there is ample evidence that the notaries in Louisiana, even if they were government officials, also served private parties by drafting and authenticating contracts. In fact, at least during the French period, their main sources of income were "fême et terre", i.e., marriage contracts and conveyances.[60] Both were essentially governed by the *Coutume de Paris* as the law under which the Superior Council operated[61]. For the Spanish period, the notarial role in private transactions is reflected in the *Ordinance of Unzaga* under which the Spanish governor required notarization of all contracts of sale (or "alienations") of slaves, plantations, and real estate as well as those pertaining to shipping[62]. This also shows that in Louisiana, again in contrast to the Spanish Southwest, there was a considerable amount of private business requiring notarial services. Although the colony's population during the eighteenth century never exceeded a few thousand Europeans, New Orleans was a port city, plantations were being established, and slave trade was beginning to thrive. Cargo shipping and international trade, the sale and mortgaging of land, and transactions involving slaves all provided work for notaries.

3. The Dutch Presence: New Netherland

The Dutch began to colonize present-day New York in the early seventeenth century. In 1614, they built Fort Nassau and a decade later, when the first major settlement was founded on Manhattan Island, they began to call the area "New Netherland". Colonization, however, was mainly the work of the (Dutch) West India Company, a chartered trading organization with a license from the homeland to exercise governmental power overseas. In the 1640s, Petrus Stuyvesant arrived on Manhattan as the resident director of the West India Company and turned it into an active trading post with a fort for its protection. Yet, Dutch rule at the mouth of the Hudson was relatively short-lived. In 1664, the English took over by military force, and New

[57]See Laura Porteous, Index to Spanish Judicial Records of Louisiana: May-June 1773, 9 Louisiana Historical Quarterly 533 (1926).

[58]Baade, supra note 43, 52.

[59]Id., 38-39.

[60]Id., 26. For a marriage contract made by a notary public in 1779, see Laura Porteous, Marriage Contracts of the Spanish Period in Louisiana, 9 Louisiana Historical Quarterly (1926) 385-397.

[61]According to the *Coutume de Paris*, marriage contracts as such actually did not require notarization but they usually contained elements that did, especially conventional mortgages and donations. Also, laypeople would normally not attempt to draft complex documents of such long-term importance without notarial help; see Baade, supra note 43, 18-19.

[62]Reprinted in Old Documents, 2 The Louisiana Historical Quarterly (1919) 447, at 448-449.

Amsterdam became New York.[63]

Similar to the situation in Spain as well as in French and Spanish Louisiana, there were essentially two types of people performing notarial work in the Dutch colony[64]: government "secretaries" (*secretarissen*) and "professional notaries" (*beroepsnotarissen*)[65].

The secretaries came first, soon after the establishment of governmental bodies. Some of them were attached to the provincial government (*Directeur-Generaal en Raden*); the majority worked for the local courts (*schepencolleges*). All in all, the records list about a hundred of them over a fifty year period (1625-1675)[66]. Like their colleagues in the Spanish and French provinces, they were government officials with a variety of functions of which notarizing documents was only one. Yet, acting as notaries played a significant role for them, especially since emoluments from notarial acts were the most important source of income for these otherwise poorly paid secretaries. It was thus to their advantage that under several ordinances from the first half of the seventeenth century, authentication by a secretary was required for a variety of documents and transactions (wills, marriage contracts, sales, leases, etc.) to be valid[67]. It was also to their advantage that they had no private competition for the first twenty-five years of the colony.

The arrival of professional notaries in the middle of the seventeenth century was the result of citizen protest against this monopoly. The colonial burghers sent three envoys to the mother country, complaining not only about the government monopoly in general but also, it seems, that the secretaries were not reliably neutral in the exercise of their powers. The burghers' grievances were written down in the *Vertoogh van Nieu Nederland*. In reaction, the Dutch government (*Staten Generaal*) appointed Dirck van Schelluijne as a (non-government) notary who then emigrated and arrived in New Netherland in 1650[68]. At first, he faced strong resistance by Stuyvesant, the Dutch West India Company's director, who did not want to relinquish control over the authentication and flow of documents (and who may have wanted to protect the spoils of his secretaries as well). Stuyvesant's resistance was overcome only upon further citizen complaints and with the help of the Dutch government. Later, the provincial authorities appointed more notaries on their own initiative. The records list seventeen *beroepsnotarissen* over the next two-and-half decades until the line ends in the late seventeenth century[69].

These Dutch professional notaries were engaged in what we would today call private practice[70].

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[63]The Dutch briefly recaptured the area in 1673 but returned it to England by treaty the year after.

[64]The situation in the Dutch colonies is described and documented in considerable detail in J.A. Schiltkamp, De geschiedenis van het notariaat in het octroogebied van de westindische compagnie (1964).

[65]In addition, there were "government clerks" (*gezworen clerken*). This term could mean the "secretaries" themselves or members of their clerical staff. The latter had no independent power to perform notarial functions but could do so only when the secretary was not available and the clerk functioned as secretary on duty, id., 158-159.

[66]Id. 309-312.

[67]Id. 61-62.

[68]Id. 130-134.

[69]Id. 322-323.

[70]The following account draws heavily on the lively portrait of seventeenth century Dutch colonial notary Adriaen Janse van Ilpendam in the carefully researched study by Donna Merwick, Death of Notary (Ithaca and

To be sure, they were appointed by the local government, held a kind of public office (meaning that they had to serve all comers), and took an oath to serve the public faithfully. Occasionally, they also did government jobs, but they primarily worked for, and were paid by, private clients. They drafted contracts, especially commercial agreements, and powers of attorney, mainly for use overseas. They conducted conveyancing although they could not transfer deeds - that was the town secretary's jurisdiction since the deeds had to be entered into the land registry. They kept records of their work and made copies upon request. They regularly advised their clients and often mediated disputes. Sometimes they took depositions, i.e., sworn witness statements, for use in court. In all this, they were, unsurprisingly, much like their colleagues at home in the Netherlands[71].

A few exceptions aside, Dutch notaries had no formal legal training at the university level. They acquired their professional knowledge by working with practicing notaries as apprentices and by reading contemporary instruction manuals, such as Jacques Thuys, *Ars Notarius* (1590, new edition 1645)[72]. Thus they were not perceived as lawyers but rather as "practitioners of the *ars dictaminis*"[73], although they were expected to have some knowledge of the Dutch laws and perhaps a basic command of written Latin. In all this, they were "something between the ordinary burgher of limited schooling and...university trained lawyers."[74] In the colonies, there were, of course, fewer notaries around to learn from and fewer instruction books to read so that the professional knowledge of the notaries in New Netherland was likely more rudimentary than in the motherland - unless, of course, they had already acquired that knowledge before coming to the New World.

In New Amsterdam, being a notary was often not a full-time occupation and rarely sufficed to make a good living. Business was often scarce and the fees, set by government ordinance, were low. Colonial notaries thus often needed to make money in other ways as well, for example as schoolmasters or by seeking appointments as administrators of estates, tax collectors or mediators of disputes, or even by engaging in commerce or agriculture[75]. Yet, although they were neither university-trained nor full-time professionals, notaries enjoyed a certain prestige and were usually among the more respectable citizens of their town[76].

The Dutch colonial notaries' position is best understood in light of the contemporary gap between the need for written documents and the inability of most citizens to create them. On the one hand, people in seventeenth-century New Netherland (as well as at home in Holland) wanted their transactions in writing, mainly because it promised certainty, permanence, and proof in case of a dispute. This was particularly true in the merchant community which needed reliable

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London 1999).

[71]For the situation in the early modern Netherlands, see Sebastiaan Roes, Geschichte und Historiographie des niederländischen Notariats: Ein Überblick, ch. III (in this volume).

[72]Schiltkamp, supra note 63, at 48, also lists J.Thuijs, Ars notariatus (1585) and C. Ablijn, Ars Notariatus (1561).

[73]Merwick, supra note 69, 189.

[74]Id.

[75]Schiltkamp, supra note 63, 381.

[76]See Merwick, supra note 69, 4.

contracts for overseas trade and in the courts which wanted correctly drafted documents from the parties before them[77]. On the other hand, literacy was still fairly limited. In the Dutch colony, only four out of five men and only two out of five women could even sign their name, and many fewer would have been able to write so much as a letter, not to mention a legal document[78]. Thus people needed experts to satisfy the widespread "craving to get things in writing,"[79] especially to put their affairs in legally correct terms and form. Strictly speaking, it was not required by law that the notaries draft all the documents they did but - just like a complex tax return today - it was practically impossible for most people to handle it by themselves.

II. The Nineteenth Century: Exit the Notary

On March 12, 1686, Adriaen Janse van Ilpendam hung himself. Janse was a Dutch notary in the small town of Beverwijk in New Netherland. About twenty years before, the colony had changed from Dutch to British hands, and Beverwijk was renamed New Albany. The British brought with them their legal system - cases, statutes, procedures, courts - and that system ultimately had no place for a civil law notary[80]. It is doubtful that the gradual loss of his professional position under British rule was the main cause of Janse's suicide but it may well have contributed[81].

1. The Vanishing of the Civil Law Type

At the beginning of the nineteenth century, the territory today comprising the lower forty-eight US states could be divided into two great parts: the still-young United States of America, which consisted essentially of the original thirteen colonies on the Eastern seaboard; and the remaining area which was still under foreign rule (or Indian territory). Over the next half-century, the United States acquired virtually all this remaining area - through money or force - and thus expanded to the Gulf Coast and the Pacific shores[82]. In essence, the (relatively small) Republic

[77]In the small colonial town of Beverwijk, the local court became angry when it received documents that were not in proper notarial form, id., 11.

[78]Id., 227.

[79]Id., 212; see also id. 112-113.

[80]The disappearance of the civil law notaries in the formerly Dutch, now English, colony was a gradual process lasting several years. The Dutch notaries did not immediately lose their positions and functions, and in fact, a few English notaries were at first appointed beside them. Even after the definite passing of the colony to England in 1674, the Dutch notaries were not dismissed. They did, however, increasingly lose their function as the legal system changed, a process that must have been complete around 1680. For a more detailed account, see Schiltkamp, supra note 63, 134-136.

[81]The whole story recounted in, and the whole tone of, Donna Merwick's book, supra note 69, implies that Janse's suicide was closely related to the change in his legal environment which robbed him of his professional position and work, although Merwick is too careful to claim that expressly. But Janse was not a particularly happy man even before the British came. His notarial business never thrived, always remained a part-time occupation, and never sufficed to support him financially. In 1686, he also had other reasons to feel at the end of his rope. He had no children, his wife had died three years before, and at 68, he had reached a very advanced age by the standards of his time. In short, he was old and lonely and, who knows, possibly ill.

[82]Through the Louisiana purchase of 1803 the United States acquired (roughly) present-day Louisiana, Alabama,

living under the English legal tradition gobbled up the (much larger) part subject to Spanish, Mexican, or French law. As a result, with the notable exception of Louisiana, the common law pushed out the civil law. This process was by and large complete in 1850 when the newly admitted State of California officially decided to abandon the Spanish-Mexican legal tradition in favor of the English one[83].

The displacement of the civil law by the common law entailed the vanishing of the civilian notarial tradition. In the Spanish and Mexican territories, i.e., in Florida and the Southwest, full-fledged notaries had by and large disappeared, as we have seen, during the eighteenth century when the Spanish system of government gradually broke down. Their functions had been performed by substitutes such as *alcaldes,* military commanders or priests[84].

But even where civil law notaries (or their substitutes) were active, as they had been in seventeenth century New Amsterdam, the arrival of the common law soon put an end to their work because they were like a fish out of water. They faced laws they did not know, procedures they could not handle, and a language they did not understand - or at least could not write documents in[85]. This was not only professionally devastating, for many it must also have been humiliating on the personal level. Suddenly finding oneself clueless and useless is not a happy experience.

2. The Non-Start of the English Type

One could think that with the westward expansion of the common law, the vanishing civilian notary would have been replaced by an English equivalent. Yet, that was not the case. This is both easy and difficult to explain.

It is easy to explain with regard to the government-affiliated notaries we have found in the Spanish, French, and Dutch colonies. Such government-notaries simply did not exist in the English legal system. To be sure, the English Crown had occasionally employed notaries ever since the Middle Ages, but even at home, it did not rule through a centralized, hierarchical bureaucracy with "secretaries" or "clerks" performing administrative acts throughout the country. In its American colonies, the British did not rule through such officials on the ground either. In contrast to the Spanish colonial system under which the homeland tried to govern its overseas

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Iowa, Minnesota, North and South Dakota, as well as Wyoming and parts of Montana; in 1819 it acquired Florida from Spain (including parts of present-day Alabama and Mississippi); in 1846, it added Texas and New Mexico, and in 1848 California.

[83]See California Senate Committee on the Judiciary, Report on Civil and Common Law (1850), reprinted as Appendix to the Journal of the Senate of the State of California 459 (San José 1850).

[84]See supra I.1.

[85]See Merwick, supra note 69, XVI, 113, 161-163, 173. At one point, Janse spells his own profession as "Note Republic", i.e., he "cannot even spell what he is", id., 173.

possessions as directly as possible[86], the British showed little desire to exercise close administrative control in the New World. Aside from a governor more or less loyal to the mother country, they left the American colonial government by and large unto itself[87], at least as long as taxes were paid.

The absence of notaries in the young United States is more difficult to explain with regard to the professional notary, i.e., the officially appointed but privately practicing specialist in drafting documents, conducting conveyances, and putting all sorts of matters into correct legal form. After all, such specialists *did* exist in early modern England[88]. They just never established themselves in the British colonies and thus did not take root in the American Republic either. One can think of several reasons why they never made it across the Atlantic but it involves some degree of speculation. To begin with, the colonial legal system, reflecting the social and economic conditions on the ground, was still quite primitive. It had barely enough trained lawyers and scarcely room for a specialized profession of (English-style) notaries. This argument is somewhat undercut by the fact that the legal system in seventeenth century New Amsterdam was no less rudimentary, and we know that notaries (like Adriaen Janse van Ilpendam) did exist there. But there was a difference that gets us to the next possible reason for the lack of English-style notaries on American soil. In contrast to the Netherlands, the notarial profession in England was "of slight importance"[89]; it was small in numbers,[90] had a very limited function, and was not one of the core elements of the legal culture. Thus, the English notary public was not among the defining features of the legal system that were quasi-automatically exported along with it, like jury trials. In other words, even a rudimentary Spanish, French, or Dutch legal system was hard to imagine without notaries but a rudimentary English legal system could well do without them[91]. Finally, and this may just be another way of looking at the same phenomena, it is doubtful that there would have been enough business in the colonies to support a class of English-style notaries. In the motherland, these notaries worked primarily in three areas: ecclesiastical matters, conveyancing, and international commercial affairs especially in the admiralty context[92]; none of these fields were fertile ground in the British colonies. Ecclesiastical jurisdiction simply did not exist since there was no state church; matrimonial causes, wills, and probate proceedings were thus all handled in the regular courts and by the regular bar. The sale

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[86]Supra I.1.

[87]See Oliver Dickerson, American Colonial Government (Cleveland/OH 1912); J.H. Elliot, Empires of the Atlantic: Britain and Spain in America (New Haven 2006); James Lang, Conquest and Commerce, Spain and England in the Americas (New York 1975). Another, and related, difference between the Spanish and the English colonial system was that the former was on a proselytizing mission, aiming to spread the proper (Catholic) faith to the new world, while England showed little ambition to impose its state religion on the colonies.

[88]Brooks, Helmholz and Stein, supra note 5; see also H.C. Gutteridge, The Origin and Historical Development of the Profession of Notaries in England, Cambridge Legal Essays (1926) 123-137. For the Middle Ages, see C.R. Cheney, Notaries Public in England in the thirteenth and fourteenth centuries (Oxford 1972).

[89]Theodore Plucknett, A Concise History of the Common Law (5th ed. Boston 1956) 227. See also William Holdsworth, History of English Law, vol. V (2d ed. London 1937) 114-115.

[90]Brooks, Helmholz and Stein, supra note 5, 116.

[91]This had much to do with the preferred methods of proof, see infra. IV.2.

[92]Brooks, Helmholz and Stein, supra note 5, 4-5.

and purchase of land did not occasion much notarial business since it was usually done by the parties themselves in open court; they came before the judge or magistrate who made their agreement official and gave it effect by entering it into the court records[93]. And foreign commerce was still rather weakly developed throughout much of the English colonial period; what need for legal services it generated could be satisfied by the few lawyers already there[94].

3. The Emergence of the American Type

There were, however, some kinds of business traditionally in the hands of the English notaries that apparently did exist in sufficient volume even in the colonies: the administration of oaths, the certification of certain commercial instruments, and protests regarding their non-payment.[95] These jobs were not absorbed by the colonial bar, probably because they were of an essentially clerical nature. They thus became the field of a group specializing in clerical matters - the notaries public American-style[96].

These kinds of notaries could be found in the colonies since the seventeenth century[97]. They were either elected or commissioned by the governor, and the colonies began to regulate their position by statute since the early eighteenth century[98]. Like their present-day successors, they performed purely clerical functions and were thus not part of the legal profession proper. It is only this kind of notary public that carried over from the colonial age into the Republic and that we therefore find in United States (again, with the exception of Louisiana)[99]. This American-type notary public continued to perform the clerical work that had been his domain since colonial times, i.e., authenticating signatures, administering oaths, and occasionally protesting negotiable instruments for non-payment[100]. In the nineteenth century, he sometimes got involved in judicial

[93]See Malavet, supra note 1, 426-427.[background check]. In addition, the English notaries' conveyancing functions were in were in decline throughout the period. They gradually lost the conveyancing business to competition from the solicitors and were finally excluded from it altogether in 1803; see Burke and Fox, supra note 5, at 321.

[94]Note that commerce in his New Netherland environment never generated enough work to support Janse van Ilpendam, although Beverwijk had a port from which ships sailed to and from Holland, Merwick, supra note 69, 21 and *passim*.

[95]Brooks, Helmholz and Stein, supra note 5, 68.

[96]See Malavet, supra note 1, 427.

[97]Michigan Notarial Manual, supra note 10, 2 (claiming that the first such notary was appointed in the colony of New Haven in 1639).

[98]See id.; Malavet, supra note 1, 426-427. Little else seems to be known about them, perhaps because they were, and are, considered too unimportant to warrant serious historical study. Neither the Michigan Notary Manual nor Malavet provide any citation, not to mention any references to original sources, in support of their assertions.

[99]In other parts formerly under French rule, or at least influence, such as Illinois (which changed from French to British hands in 1765), the common law eventually prevailed as well and thus wiped out what civilian notarial tradition there was; see Baade, supra note 43, 29.

[100]They occasionally appear even in decisions of the United States Supreme Court, e.g., Nicholls v. Webb, 21 U.S. 326 (1823); Burke v. McKay, 43 U.S. 66 (1844). Both cases state, however, that a notarial protest is not required by general commercial law but merely a matter of custom and convenience although some state laws deviated from that rule, see Nicholls v. Webb at 331. This is also one of the very few contexts in which the notary

business but only because he was at the same time a justice of the peace[101]. Even this was very much an exception limited to a few, mainly southern, states and gradually fell by the wayside.

The bulk of the legal work traditionally performed by civil law notaries in private practice - drafting contracts, wills, partnership agreements and the like, as well as conveyancing - was performed by lawyers in the United States, just as it was in England where notaries public lost most of their business to solicitors in the nineteenth century[102]. In order to handle such work, American lawyers often employed their own clerical personnel: scriveners, i.e., clerks preparing and copying documents by hand at a time when photocopying still lay a hundred years in the future. Herman Melville's short story *Bartleby* provides a vivid description of this practice[103].

4. The Special Case of Louisiana

Only one state took a different course: Louisiana. Here, the civil law system survived and with it the notary[104]. Notaries have remained a protected legal profession in the Bayou State. While they do not have to be lawyers[105], they have to take a written qualifying examination (consisting of three parts and lasting about five hours), and they are appointed for life[106]. Their function continues to have "quasi-public aspects, both in relation to the duties imposed and in the amount of government control over the profession"[107]. They are closely regulated by statute[108] and today, they must even file an annual report with the Louisiana Secretary of State[109].

Louisiana notaries have fairly wide-ranging powers, inter alia, to "receive wills, make protests, matrimonial contracts, conveyances, and generally, all contracts and instruments in writing"[110]. Most importantly, they have the power to execute authentic acts[111], and an authentic act

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public is discussed in the legal literature of the time, see, e.g., Joseph Story, Commentaries on the Law of Promissory Notes (Boston 1851) 364-366; Joseph Story, Commentaries on the Law of Bills of Exchange (4th ed. Boston 1860) 304-307; Timoth Walker, Introduction to American Law (10th ed. Boston 1895) 531.

[101]See, e.g., Caroll v. State, 58 Alabama 396 (1877); Harper v. State, 109 Alabama 66 (1896); Douglass v. State, 117 Alabama 185 (1898); Wingo v. Parker, 19 South Carolina 9 (1881). The same was true in Mississippi.

[102]Burke, Helmholz and Stein, supra note 5, 2.

[103]Herman Melville, Bartleby (1853), in The Portable Melville (J. Leida ed. New York 1952) 465.

[104]In Louisiana, there are also ex officio notaries in the employ of government offices, agencies, or departments. They are subject to different regulations, see Louisiana Revised Statutes 35 §§ 391-409, and not discussed here.

[105]But see infra notes 121-122 and text.

[106]This is provided that they comply with the statutory requirement of renewing their bond every five years, Burke and Fox, supra note xx, 329.

[107]Barlow Burke and Jefferson Fox, The Notaire in North America: A Short Study of the Adaptation of a Civil Law Institution, 50 Tulane Law Review 318, 330 (1976).

[108]The respective statute is codified in Louisiana Revised Statutes Chapter 35 which contains several hundred provisions (articles, paragraphs, and subparagraphs).

[109]Louisiana Revised Statutes 35 § 202 (2004).

[110]Louisiana Revised Statutes 35 § 2 A (1)(b).

[111]Id. § 2 A (2). Authentic acts are defined in Art. 1833 A of the current Louisiana Civil Code as "a writing executed before a notary public or other officer authorized to perform that function, in the presence of two witnesses and signed by each party who executed it, by each witness, and eacy notary public before whom it was executed."

"constitutes full proof of the agreement it contains, as against the parties, their heirs, and successors"[112]. The same probative effect is accorded to copies of an authentic act if certified by the notary before whom it was passed[113].

The Louisiana Civil Code provides for notarial participation in a long list of instances. Very few of them, however, *require* notarization, as in the case of donations *inter vivos* of real estate or incorporeal things[114]. In the vast majority of cases, execution before a notary is merely optional. That is true also for transfers of title to real property: it can be done by authentic act or "by act under private signature"[115]. Nonetheless, notaries in Louisiana continue to play a substantial role in conveyancing[116].

Yet, even in Louisiana, there has been a gradual "decline of the pure civil law notarial tradition" over the years[117]. This is not only because notaries there "do not possess as much power as they once did"[118]. It is also because the traditional notarial function of rendering neutral advice to both parties and of exercising quality control over the transaction has been more or less abandoned[119]. After all, it is hardly compatible with the traditional role that Louisiana notaries were allowed to be involved in transactions of banks or corporations of which they were themselves shareholders, directors, officials, or employees[120]. In addition, Louisiana notaries are no longer required to keep public records of the acts executed before them because such records are now being maintained by the parishes (counties)[121]. Finally, the notarial profession has lost much of its distinct profile by substantially merging with the practicing bar. While the functions and powers of notaries on the one hand, and attorneys on the other, remain separate as a matter of law, today many notaries are also attorneys and vice versa[122]. The main reason behind this seems to be that for members of the bar, the professional examination for notaries, which has become difficult to pass, is waived[123]. This makes it easy for attorneys-at-law to enter the notarial profession as well.

As a result of all these developments, two authors writing about the *notaire* in Louisiana

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Note that the numbering of the Civil Code has changed over time; current Art. 1833 used to be Art. 2243.

[112]Louisiana Civil Code Art. 1835.

[113]Louisiana Civil Code Art. 1840.

[114]Louisiana Civil Code Arts. 1536, 1538.

[115]Lousiana Civil Code Art. 1839. In any event, such transfer becomes effective vis-a-vis third parties only upon entry of the transaction into the official registry, id. Art. 1839 sec. 2.

[116]Burke and Fox, supra note 106, 329-330.

[117]Burke and Fox, supra note 106, 330.

[118]Closen, supra note 7, 214.

[119]Malavet, supra note xx, 428. Louisiana notaries can be liable for professional malpractice, however, even to third party beneficiaries, see, e.g., In re Killingsworth, 292 Southern Reporter 2d 536 (Louisiana 1973).

[120]Louisiana Acts 1920, No. 62 § 1; today codified in Louisiana Revised Statutes 35 § 4.

[121]Yet, notaries still have to record "all acts of sale, exchange, donation, and mortgage of immovable property passed before them", Louisiana Revised Statutes 35 § 199 A.

[122]See Paul Brosman, Louisiana - An Accidental Experiment in Fusion, 24 Tulane Law Review 95 (1949).

[123]Lousiana Revised Statutes 35 § 191 C (2)(e). Also, since 1964, the professional examination has been administered by a board consisting of three members two of which were attorneys. Thus, members of the bar have gained effective control over the admission of new notaries, see Burke and Fox, supra note 106, 331.

concluded a generation ago that "the truly civilian notary has substantially disappeared"[124]. While this may be an exaggeration, there is some truth in it. Be that as it may, given their qualifications, powers, and functions, Louisiana notaries are still much closer to their civil law colleagues abroad than to the notaries public in the rest of the United States[125]. Thus the civilian notarial tradition has survived in at least one corner of the United States, though in somewhat diminished form.

III. The Present: The Revival of the Civilian Model

On the whole, by the end of the twentieth century, precious little was left of the civil law notary in the United States. He had entirely vanished in all states but Louisiana, and even there, both his powers and importance had suffered considerable decline. Yet, it is in the nature of surprises that they happen when one least expects them: just when it seemed certain that the civil law notary in the United States was on his final march to the historical museum, he reappeared on the scene with unexpected vigor, albeit (at least for the time being) only in a limited geographic area.

1. The Latin America Effect

The resurrection of the civil law notary had nothing to do with love for the lost civilian tradition. Instead, necessity was the mother of invention. This necessity was created by the intensifying interaction between the United States and Latin America, both through large-scale immigration and through growing business connections[126].

Toward the end of the twentieth century, millions of immigrants from Latin America had established themselves in the United States. Most of them had remaining ties with relatives, and often with property, in their countries of origin. This led to a myriad of interactions between

[124]Burke and Fox, supra note 106, 329.

[125]This is also strongly claimed by the professional literature there, see Kathy Underwood, Louisiana Notary Handbook (Eagan/MN 2006) § 1:3.

[126]For background information, see Brock McCane and Michael Tessitore, The Florida Civil Law Notary: A Practical New Tool for Doing Business with Latin America, 32 Stetson Law Review 727 (2003) 727-730. The lack of civil law notary was first brought to the attention of the states' authorities in the 1970s and 1980s in a peculiar context. Immigrants from Latin American countries seeking help in dealing with US immigration authories often turned to "notaries public" in the mistaken assumption that they were dealing with the equivalents of Latin American "notarios publicos" - civil law notaries, i.e., lawyers. In many cases, unscrupulous notaries public took advantage of this mistake. They promised, and charged for, legal advice and assistance they were neither licensed nor qualified to render. For the unsuspecting immigrants, this frequently increased their problems rather solving them; see Gail Appleson, Unscrupulous Notaries Spur Chicago Probe, 68 American Bar Association Journal 1357 (1982); Milagros Cisneros, H.B. 2659: Notorious Notaries - How Arizona is Curbing Notario Fraud in the Immigrant Community, 32 Arizona State Law Journal 287 (2000); Florida Governor's Study Commission on Notaries Public (1989). Pretty soon, several states began to enact legislation expressly forbidding notaries public to call themselves "notarios publicos" and often ordering them expressly to state that they were not attorneys-at-law; see, for example, California Government Code § 8219.5 (1976, as amended in 1998).

these United States residents (or citizens) and Latin American countries. Immigrants often needed to execute wills, renunciate inheritances, establish child adoptions, etc., with effect in Latin America. This created a dilemma: Latin American countries expected the respective documents to come in the form of "authentic acts" but there were no civil law notaries in the United States (outside of Louisiana) with the power to create such acts. Similar problems developed in the commercial realm. The growing economic interdependence between the United States and Latin America, especially Mexico within the framework of NAFTA, created a growing need that commercial instruments drawn in the United States be recognized in Latin America. Yet, again, such recognition often required notarization creating *publica fides* which could not be achieved in the United States. In short, both in the family law (or probate) context and in the commercial area, the impossibility to obtain "authentic acts" in the United States became a regular obstacle in US-Latin American relations.

2. The Re-Birth of the Civil Law Notary

At the end of the twentieth century, Florida and Alabama reacted to the need for properly authenticated legal documents by creating the "civil law notary". Florida enacted its civil notary law in 1997[127]; Alabama followed suit later the same year[128].

It light of the background just discussed, it is not surprising that this new position was modeled roughly on the Latin "notario publico" as a legally trained and highly qualified professional with substantial public power[129]. In order to become a civil law notary in Florida or Alabama, a candidate must be 1) a member of the state bar, i.e., a practicing lawyer[130], 2) with at least five years experience, 3) pass a special examination (the details of which are determined by administrative regulations), and 4) receive an official appointment by the Secretary of State. The appointment is for life, allows the notary to advertise as "Notario Publico" (or "Florida International Notary"), and confers substantial powers. The notary has the power to issue authentic acts (and to authenticate documents) the contents of which shall be presumed correct; to administer the requisite oaths and make certificates thereof as necessary; to take acknowledgments of deeds and other instruments; and to issue certified copies of authentic acts to interested individuals. In addition, he or she has the powers of the traditional American notaries public and in Florida, the civil law notary can also solemnize the rites of matrimony.

[127]Codified as Florida Statutes Chapter 118 (the traditional notaries public are addressed separately in Chapter 117); the title of the section, "International Notaries" evinces the reason and purpose behind the statute. Details are regulated by the Florida Secretary of State (Florida Administrative Code IC 18.001). For a brief overview in Spanish, see David Willig, El Renacimiento del Notario Latino en el Estado de la Florida, available at http://www.nacln.org/REF-NACL.html (last visited August 16, 2007); in French, David Willig, Le Notaire de Droit Civil en Florida: Une Overture au Monde, id.

[128]The statute is codified in Alabama Code Title 36, Chapter 20, Article 3 (§§ 36-20-50 through 55); details are addressed in Alabama Administrative Code ch. 820-6-1-.01, et seq.

[129]There are some differences between the Florida and the Alabama version of the civil law notary but they pertain to details and can be left aside here.

[130]It is noteworthy that in this regard, the qualification requirements in Florida and Alabama are stricter than in Louisiana, where notaries do not have to be (although they often are) lawyers, see supra II.4.

The duties of civil law notaries include recording their acts in a protocol and (in Florida) to file annual reports with the Department of State. Notaries have to post bond, are subject to supervision and discipline by the respective state authorities, and may be liable for damages in case of professional malpractice.

Yet, these new civil law notaries still differ from their colleagues in Latin America and most of Europe in several regards. To begin with, unlike notaries in most (though not all) civil law jurisdictions, they are at the same time attorneys and thus not as strongly insulated against taking partisan positions as a notary in Mexico or France. Furthermore, the number and distribution of civil law notaries is not regulated by the state but left to the market. Thus, there is neither a limit on their number nor a guarantee that clients will find a civil law notary in every district. In other words, civil law notaries are not protected against competition, and clients are not protected against lack of access. Under such a market approach, it makes sense that the notarial fees are, like those of attorneys, left unregulated as well.

There is another important difference between these American civil law notaries and their colleagues abroad: Florida and Alabama notaries operate in a home environment that neither requires the notarization of certain legal documents or transactions nor accords "authentic acts" particular probative value. As a result, citizens do not *need* these notaries in the domestic legal context. Thus, the main purpose and effect of the Florida and Alabama civil law notaries' work, like that of their English colleagues, lies outside of their own jurisdiction. Like in colonial times under the Spanish rule, these notaries connect, so to speak, local transactions to government rules abroad. In Florida, the respective rules implicitly acknowledge this in two ways. First, they order that a civil law notary's authentic act be accompanied by statement, written in English, that "Under the laws of the State of Florida....this authentic act is legally equivalent to the authentic acts of civil-law notaries in all jurisdictions outside the geographic borders of the United States and is issued on the authority of the Florida Secretary of State"[131]. Second, the State of Florida must help its civil law notaries to have their acts recognized abroad by providing an "apostille", i.e., a certification and explanation of a civil law notary's authority under Florida law[132].

3. The Way of the Future?

Given the fact that the Florida and Alabama civil law notary is primarily geared toward handling international private or commercial affairs in the United States-Latin America context, it will remain a fairly specialized and limited profession. It hardly heralds the full-scale return of the

[131]Florida Administrative Code, IC-18.001 (6)(a)5. To be sure, this is a somewhat curious statement. After all, whether a Florida civil law notary's authentic act is *truly* "legally equivalent" to the act of a civil law notary in a foreign country is ultimately for that country to decide. Thus, the statement is essentially an appeal to international comity.

[132]"If certification of a civil-law notary's authority is necessary for a particular document or transaction [*scil.*: in a foreign country]...the Secretary of State shall issue a certification of the civil-law notary's authority, in a form prescribed by the Secretary of State, which shall include a statement explaining the legal qualifications and authority of a civil-law notary in this state." Florida Statutes 118.12. Alabama law is similar, see Alabama Code § 36-20-55.

civilian notary to the United States as a whole. It would be wrong, however, to belittle it as a temporary or local phenomenon.

The civil law notary is certainly here to stay. Ten years after the enactment of the Florida and Alabama statutes, the new kind of notary has grown into a player of some importance in these states. In Florida, there are already over 100 such notaries. The potential of the civil law notary has not escaped other parts of the legal profession, especially immigration lawyers[133]. Civil law notaries have also quickly organized themselves, as Americans like to do. In connection with the Florida and Alabama initiatives, they have formed the National Association of Civil Law Notaries (NACLN). The NACLN is affiliated with the International Union of Notaries (UINL). It thus provides a link between the new civil law notaries in the United States and the civil law tradition in Latin countries.

There is a good chance that the civil law notary will appear in other US-states as well. Immigration (both legal and illegal) from from the South, especially from Mexico, into the United States continues unabated and ties with Latin America grow stronger every day. Hispanics already constitute about fifteen percent of the American population, are its fastest growing segment, and are projected to reach twenty-four percent by 2050[134]. In some parts of the country, they are already a majority. Interaction with Latin American legal systems is thus certain to increase. It is no wonder then that other states like Texas and Illinois are currently thinking about following in Florida's and Alabama's footsteps. There is now a Model Civil Notaries Act[135] ready for adoption by willing states or at least suited to provide guidance. As a result of these developments, the new civil law notary may well at some point surpass the Louisiana kind in numbers, professional impact, and economic importance.

IV. A Broader Assessment: The Civil Law Notary and the American Legal System

The history of the notary in the colonies and the United States shows that the fate of this profession has been directly tied to the fate of the civil law in the region. The notary first arrived with the Spanish and French explorers and soon became an integral element of the colonial legal systems established by the continental European powers - be it as a government clerk, a private practitioner, or both. By contrast, he played no role where the common law prevailed, i.e., in the British colonies. With the southern and western expansion of the United States in the first half of the nineteenth century, the common law pushed out the civil law and with it the notarial tradition. Louisiana remained an exception; but as it mutated into a mixed legal system under the

[133]See Boyd Campbell and Ronald Neiwirth, The Use of Civil Law Notaries in the Immigration Arena, 23 Immigration Law Today (published by the American Immigration Lawyers Association) 50 (2000).

[134]U.S. Census Bureau, Hispanic Americans by the Numbers, http://www.infoplease.com/spot/hhmcensus1.html (last visited August 14, 2007). Only Mexico and Colombia have larger Hispanic populations than the United States. There are already more Hispanics in the US than in Spain, id.

[135]Reprinted as Appendix B in McClane and Tessitore, supra note 125, 764-767.

increasing influence of the surrounding common law environment in the nineteenth and twentieth centuries, the civil law notary suffered a decline in power and importance there as well. Even when the notary experienced an unexpected revival at the end of the twentieth century in Florida and Alabama, its resurrection was ultimately due to the civil law: the lawyer-notary was tagged on to the common law system not for any domestic purpose but in order to facilitate the interaction with Latin American countries. In short, where the civil law flourished, the notary did as well, and where the common law took over, the notary lost out.

Why? One can of course respond that the notary is simply part of the civil law culture and thus could not survive the coming of the common law. But this answer just restates the facts. It is also unsatisfactory because many other elements of the civil law did survive the arrival of the Anglo-American legal system, especially in the Southwest: community property among spouses, concepts of water rights, the holographic will, various elements of court structure and procedure, etc.[136] More generally, in the nineteenth century, the young American Republic's legal system was wide open to all sorts of civilian influences, ranging from the elements of contract doctrine to continental conceptions of private international law and, later, the study of law as an academic subject taught in a university by full-time professors and scholars[137]. If such elements could become integral parts of the American legal culture, why not the notary?

The short answer is that the civil law notary was fundamentally at odds with the American environment for a whole number of reasons. These reasons may be labeled substantive, procedural, cultural, and historical. Exploring them helps one understand not only why the notary could not survive in nineteenth century America but also how deeply embedded the institution really is in the civil law tradition and mentality.

1. Substantive Law

As a matter of substantive law, the American system simply did not have any need for notaries. While the civil law requires notarization for certain acts or transactions to be valid - exactly what these are varies to some extent among the respective legal systems - there is no such requirement in the common law at all. It is true that certain formalities may have to be observed, for example under the hoary Statute of Frauds (1677) which makes some promises unenforceable if they are not evidenced in writing. But none of these form requirements involve notaries, or, for that matter, any other public officials[138]. One might think that this is looking at things backwards: of course, in the absence of notaries, private law cannot require notarization. But notaries, i.e., professionals specializing in document preparation, did exist in medieval and early modern

[136]Lawrence Friedman, A History of American Law (3d ed. New York 2007) 114-115; see also Donald Chipman, Spanish Texas 1519-1821 (Austin/TX 1992) 250-253.

[137]See generally, Mathias Reimann (ed.), The Reception of Continental Ideas in the Common Law World 1820-1920 (Berlin 1993).

[138]The only exception is that a marriage must be celebrated before a person authorized by the state. But even that normally includes the representatives of all religions (priests, ministers, rabbis, etc.). Curiously, in a few states, it also includes (American-style) notaries public.

England so that the common law could have made their participation just as mandatory as in the civil law. It just never did[139].

To be sure, that does not necessarily put notaries entirely out of work. Many of the documents prepared by the Spanish and French notaries in the American colonies, and, as far as I can see, all of those prepared by Janse van Ilpendam, the Dutch notary in New Netherland, would have been valid even if drawn up by someone else. These documents were prepared by notaries not because substantive law required it but for other purposes - which were mainly procedural.

2. The Procedural Framework

Following the medieval canon law model, continental (Spanish, French, Dutch, etc.) civil law procedure was essentially written. This was especially true until the reforms of the nineteenth century but even today, the emphasis on writing is much stronger than in the common law orbit. Written procedure relies primarily on written evidence, i.e., on documents, and notarial documents in particular are often accorded heightened probative value, sometimes up to the point of conclusiveness. Thus, even if notarization was not a prerequisite for substantive validity, people in the Spanish, French, and Dutch colonies often wanted their documents in notarial form because that made it so much easier to prove their rights in court. Yet, once the American court system and procedure arrived, all this changed. The change was not only that "common law courts accorded no special status to legal instruments drawn by any professional, whether a notary or otherwise"[140]. It was also that common law procedure has been essentially oral and has thus not cared much for documents as means of proof at all. This has much to do with right to jury trial which is constitutionally guaranteed in the United States[141] and which the American settlers immediately established in the erstwhile foreign territories[142]. What ultimately counts before a jury is the live testimony of witnesses given in open court. In fact, relying on a document, even a notarized one, to prove what it contains would normally violate the so-called hearsay rule which forbids the parties to invoke out-of-court statements in order to prove the matter asserted[143]. In short, not only do notarial documents enjoy no heightened evidentiary value in common law courts, they are actually not very useful at all if a case goes to trial[144]. Thus, American procedure was at best indifferent, and in a sense even hostile, to the notaries' work product.

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[139]For some of the reasons, see infra. 2. and 3.

[140]See Burke, Helmholz and Stein, supra note 5, 5-6.

[141]United States Constitution, Seventh Amendment (1791).

[142]Langum, supra note 41, 145.

[143]This is, of course, an enormously crude statement of the rule that is among the most complex phenomena of the whole Anglo-American legal culture. Another way of putting it is that hearsay is (in principle) inadmissible evidence because it "does not derive its value solely from the credit of the witness, but rests mainly on the veracity and competency of other persons", Black's Law Dictionary (St. Paul/MN, 4th ed. 1968) 852, - for example, a notary.

[144]See Burke, Helmholz and Stein, supra note 5, 140 (for England). Of course, documents can still be useful simply because putting an agreement into written legal terms promotes certainty and decreases the likelihood of disputes in the first place but these benefits can be obtained by engaging any lawyer.

But there was (and still is) another tension that one may call, for lack of a better term, psychological: the mismatch between the non-contentious nature of the notaries' work and the adversarial stance of American civil procedure. Continental-style civil procedure is not sharply adversarial; it is dominated by the judge and thus often has an administrative touch. The civil law notary fits this environment because he is not an advocate for either side but a counsel to both parties. He is an expert especially in so-called non-contentious matters that occupy a middle ground between litigation and administrative proceedings. By contrast, American civil procedure is decidedly contentious. Its adversarial system has been geared toward battle, and battles need warriors, not neutral advisers who perform writing rituals[145]. In early nineteenth century America, these different stances also reflected a clash of values. The civil law tradition, especially in Spanish and Mexican lands, but also in French New Orleans and Dutch New Netherland, emphasized conciliation that found a middle ground on which both parties could save face. In this context, the notary often played the role of arbiter or mediator. The American system, by contrast, emphasized litigation that produced clear winners and losers; in this environment, the notary-mediator was out of place.[146]

3. Cultural Mismatch

Beyond the problems posed by substantive and procedural law, there was (and, again, still is) a mismatch between civil law notaries and the Anglo-American legal system on what we may call a cultural level: it pertains to the fundamental difference between the civil and the common law in their respective approaches to problem-solving.

The civil law tradition, emerging from medieval scholarship and early modern legislation, prefers to address legal problems in the abstract; it thus tries to have the solution ready at hand before an issue comes alive. In other words, it is inherently geared toward planning ahead, i.e., proactive. The virtue of this approach is that many problems are more easily solved before the fighting starts. That is exactly what the civil law notary is all about[147]. It is his or her function to write a document that bindingly regulates the parties' affairs while people are still at peace with each other. As a kind of legislator for a specific transaction, the notary is the very embodiment of the civil law mentality. By contrast, the common law as a tradition of practitioners litigating cases and of courts deciding them prefers concrete problem-solving; it seeks to tackle issues only when (and if) they arise - "we'll cross that bridge when we get to it." Thus it is, by its very nature,

[145]It is interesting to look, again, at Melville's story "Bartleby". The narrator, who, with his scriveners, performs the work traditionally done by notaries in the civil law tradition, portrays himself as distinctly unexciting: "I am a rather elderly man...I am one of those unambitious lawyers who never address a jury, on in any way draw down public applause; but...do a snug business among rich men's bonds, and mortgages, and title deeds. All who know me consider me an eminently safe man.", Melville, supra note 102, 465-467.

[146]Langum, supra note 41, 143-144. Merwick, supra note 69, 37, 115, notes that notary Janse van Ilpendam in New Netherland who had often performed the role of a mediator, wasn't needed any more with the advent of the English and their adversarial ways.

[147]See Christian Mauch, Vorsorgende Rechtspflege in Europa am Beispiel der GmbH - Lateinisches Notariat und seine Entsprechung im common law, Zeitschrift für vergleichende Rechtswissenschaft 106 (2007) 272, especially 275-276.

backward-looking, i.e., reactive. This preference reflects the belief that it is difficult to predict what questions will come up and that effective problem-solving requires cognizance of the particular circumstances in which an issue arises. From such a perspective, however, notarial efforts to produce watertight solutions in advance are not only much less valuable but, in a sense, even counterproductive.

Of course, one must not overstate this difference. Even civil lawyers understand the limits of problem-solving ex ante and know that notarization is no guarantee against litigation. And even in the common law, parties often regulate their affairs in advance - by entering into commercial contracts, executing trust deeds, or making wills. Still, both sides react differently to the idea that by notarizing a document, one could make an ex ante solution essentially conclusive - even in court. For a civil lawyer, this seems eminently sensible: the transaction has already received careful professional scrutiny at the making stage so that there is little reason to question it later. For a common lawyer, the idea that judicial scrutiny of an issue can be effectively foreclosed as a matter of law runs counter to the conviction that a case cannot really be decided before all the chips are down.

4. Historical Issues

While the legal and cultural reasons for the civil law notary's incompatibility with the American legal culture are still largely valid today (albeit with considerable modifications), there were two further reasons specific to the early and mid-nineteenth century. They may thus be termed historical. They relate not to the American *legal* system but rather to the broader socio-political environment.

As a closed and privileged profession, civil law notaries sat uneasily with early nineteenth century American ideals of populism, egalitarianism, and electoralism, particularly in the South and the West. The Jacksonian Era[148] favored, and pushed for, free access to public office as well as to the professions, usually without regard to formal qualifications. Thus, judges (in the states) and other office holders were mostly chosen by popular election, and practicing law often required no formal education and perhaps not even passing a rudimentary examination[149]. A notary *appointed* by the state (perhaps even for life) fit this atmosphere poorly at best.

All this was especially true in the frontier environment which characterized much of the United States, and virtually all of the South and West, at the time[150]. Outside of the original colonies, American society was constantly on the move, enamored with equality and opportunity but hostile to hierarchies and entrenched privilege. Notaries were, in a sense, antithetical to this

[148]I.e., the time around the presidency of Andrew Jackson 1829-37.

[149]See Robert Stevens, Law School, Legal Education in America from the 1850s to the 1980s (Chapel Hill/NC and London 1983) 6-10 (with further references); for a more critical discussion of the standard views on this period, see Michael Burge, Revolution and the Making of the Contemporary Legal Profession (Oxford and New York 2006) 269-283.

[150]See, generally, Friedman, supra note 136, 105-119.

whole set of values. They were inherited from, and in a sense embodied, the stagnant society of the European *ancien régime* with its pronounced hierarchies, government appointed officeholders, and status-conscious dignitaries. In other words, notaries represented a static world of closed professions while frontier America was all about mobility and open access. In a sense, notaries represented the kind of state power from which immigrants to the new world were eager to escape.

Finally, there was a more subtle, political tension: the notary's role as a public official operating in the realm of private law ran counter to the American ideology of the common law. This ideology was especially strong in the nineteenth century and came in at least three different, though related, versions. First, the common law was widely viewed as an instrument for the private ordering of the market; this view was based on a preference (rooted in Adam Smith's "invisible hand" theory) for an open-ended play of economic forces and in particular for free bargaining with no interference from public officials. Second, the common law was regarded as a guarantor of the more general freedom of self-reliant individuals to handle their private affairs as they pleased; they did not need, and indeed did not want, a know-all state to advise them on their own good. Finally, there was the populist credo that the common law was the law of the people, not of the state, so that laymen could and should handle it themselves without the assistance of learned men; thus the people could make their own contracts, plead their own cases in court (if they did not want to hire a lawyer), and even decide disputes as a jury of peers. These views of the common law, in turn, led to widespread hostility towards the civil law because it was perceived as pernicious in all these regards: its emphasis on officialdom was said to interfere with market activity and thus to hinder commerce; it was regarded as the law of absolutist monarchs who unduly constrained individual liberty; and its doctrine seemed unnecessarily complex, thus requiring the professional services of learned intermediares who estranged the people from the law[151].

Note that one could easily regard the notary in particular as embodying all these ills. Through him, i.e., through notarization requirements, the public power constrained the freedom of market actors to look out for their economic interests without anyone's approval. Through the notary, the state monitored how individuals pursued their welfare or even prevented them from doing as they deemed fit. And through the notary's complex legal documents, the law was put beyond the understanding of the common man (and woman). In short, the notary represented a civil law culture that was widely perceived as anti-liberal, paternalistic, and unintelligible, and which was thus resented by a society believing in *laissez faire* economics, individual self-reliance, and populist notions of law[152].

[151]The belief that there should be no need for learned intermediaries between the people and the law may well be related to the protestant credo that there should be no intermediary between the individual and God. In that sense, the Anglo-American hostility towards the civil law was also the hostility of a protestant legal culture against a catholic one.

[152]This was vividly expressed in the California Senate Committee for the Judiciary Report on Civil and Common Law, supra note 83, see especially 464-472. For the specific context of California, see also Langum, supra note 41, 140-14198. For the specific context of California, see also Langum, su

Zusammenfassung

Wer eine Geschichte des Notariats in den Vereinigten Staaten schreiben will, muß zunächst eine grundsätzliche Frage beantworten: Was ist eigentlich mit einem "Notar" gemeint? Soll man darunter den Notar der kontinentaleuropäischen (und lateinamerikanischen) Tradition verstehen? Dann meint man einen hochqualifizierten, juristisch ausgebildeten und selbständig praktizierenden Amtsträger mit der Befugnis, Rechtsgeschäfte zu beurkunden und ggf. öffentlichen Glauben zu verleihen. Nach landläufiger Ansicht gibt es diesen Notar in den Vereinigten Staaten (abgesehen von Louisiana) allerdings gar nicht. Oder versteht man darunter den "notary public", der einem in den USA zu Millionen begegnet? Dieser ist allerdings eine ganz andere Figur, denn er ist weder hochangesehen noch juristisch ausgebildet noch hat er die Befugnis Verträge u.ä. zu errichten oder Rechtsgeschäfte zu beurkunden; vielmehr beglaubigt er in der Regel lediglich Unterschriften, meist im Rahmen und als Teil einer sonstigen Angestelltentätigkeit. Wessen Geschichte also gilt es zu schreiben?

Eine Geschichte des US-amerikanischen "notary public" wäre im gegenwärtigen Zusammenhang kaum von Interesse. Zum einen wäre sie aus juristischer Sicht wenig aufschlußreich, denn der "notary public" übt eben keinen Rechtsberuf aus. Zum anderen eignete sie sich auch wegen der grundsätzlichen Unterschiede zwischen dem "notary public" amerikanischer Prägung und dem Notar der kontinentaleuropäischen Tradition nicht für einen rechtsgeschichtlichen Vergleich. Beide Figuren haben zu wenig gemeinsam, um sie sinnvollerweise vergleichbar zu machen.

Sinnvoll ist hier deshalb nur eine amerikanische Geschichte des Notars im kontinentaleuropäischen Sinne (*civil law notary*). Man könnte freilich meinen, ihr stünde entgegen, daß es diese Art von Notar in den USA nun gar nicht gibt. Genaueres Zusehen zeigt aber, daß das in dieser Allgemeinheit nicht richtig ist. Denn es hat den *civil law notary* auf amerikanischem Boden durchaus gegeben (nämlich in den spanischen, französischen und holländischen Kolonien); es gibt ihn z.T. auch heute noch (nämlich in Louisiana); und er hat erstaunlicherweise gerade im letzten Jahrzehnt eine regelrechte Wiedergeburt erlebt (nämlich in Florida und Alabama). Eine Geschichte des amerikanischen Notariats zeigt deshalb das Institut nicht nur im Wandel der Zeiten, sie vedeutlicht auch seine unmittelbare Abhängigkeit von der kontinentaleuropäisch geprägten Rechtskultur des *civil law*

I. Die Kolonialzeit: Der Notar tritt auf

Notare kontinentaleuropäischer Prägung waren in den spanischen, französischen und holländischen Kolonien in Nordamerika weitverbreitet. Allerdings bestanden zwischen den jeweiligen Regionen erhebliche Unterschiede in Berufsbild und Tätigkeit.

Notare kamen zuerst mit den spanischen Eroberern in die neue Welt. Für fast 300 Jahre (nämlich im 16. bis 18. Jahrhundert) befanden sich Florida sowie der heutige Südwesten der USA unter spanischer Herrschaft. Die spanischen Notare in diesen Gebieten standen fast ausschließlich in

Regierungsdiensten; sie waren als Schreiber (*escribanos*) den Gemeinderäten (*cabildos*) oder Kommandaturen zugeordnet. Sie waren allerdings keineswegs nur mechanisch tätig. Vielmehr waren sie oft an den Regierungsgeschäften beteiligt und hatten beträchtlichen Einfluß auf sie. Daneben gab es auch kirchliche Notare, die eine ähnliche Funktion für katholische, vom Heiligen Stuhl ernannte Würdenträger ausübten. Hingegen finden sich in den spanischen Kolonien kaum Spuren von Notaren die freiberuflich Parteien berieten und deren Rechtsgeschäfte beurkundeten. Der Grund hierfür könnte im mangelnden Bedarf liegen.
Auch im französischen Louisiana spielten Notare im 18. Jahrhundert eine erhebliche Rolle. Sie waren dort ebenfalls vornehmlich als Schreiber (*greffier*) bei der Gerichts- und Verwaltungsbehörde (Superior Council) tätig. Allerdings gab es in Louisiana daneben nachweislich auch freiberufliche Notare. Die notarielle Beurkundung privater Rechtsgeschäfte, insbesondere von Eheverträgen und Grundstückskäufen, gehörte hier durchaus zum Alltagsgeschäft. Dabei ist deutlich, daß es insbesondere in New Orleans als einer Hafenstadt bereits im 18. Jahrhundert ausreichendes Bedürfnis nach Beurkundungen gab, um einige freiberufliche Notare zu beschäftigen.

Notare im kontinentaleuropäischen Sinn gab es schließlich auch im heutigen New York während der - allerdings recht kurzlebigen - holländischen Herrschaft um die Mitte des 17. Jahrhunderts. Auch in *New Netherlands* fungierten zunächst die den Regierungsstellen zugeordneten Sekretäre als Notare. Erst später kamen freiberufliche Notare hinzu. Nach Übernahme der Kolonie durch die Briten im Jahre 1664 und dem damit verbundenen Einzug des englischen Rechtssystems verloren die holländischen Notare ihr Betätigungsfeld und starben aus.

In all diesen Kolonien waren Notare in der Regel keine studierten Juristen sondern meist praktisch ausgebildete Kenner der *ars dictaminis*. Sie hatten allerdings zumindest rudimentäre Rechts- und verwaltungstechnische Kenntnisse. Dadurch gehörten sie zu den gebildeteren und angeseheneren Teilen der Bevölkerung, sei es als Repräsenten der Kolonialregierung, sei es als Rechtsberater privater Klienten.

II. Das 19. Jahrhundert: Der Notar tritt ab

In der ersten Hälfte des 19. Jahrhunderts verleibten sich die jungen Vereinigten Staaten die ehemals spanischen Kolonien (und nachmalig mexikanischen Gebiete) sowie das vordem französische Louisiana ein. Damit weitete sich das common law von den dreizehn Gründungskolonien an der Ostküste bis zum Golf von Mexiko und zum Pazifik aus. Außer in Louisiana verdrängte es dadurch das *civil law*. Mit dem *civil law* verschwand auch der Notar kontinentaleuropäischer Prägung.

Für die als Notare fungierenden staatlichen Verwaltungsbeamten der spanischen, französischen und holländischen Kolonialherren gab es im englischen System kein Gegenstück; denn anders als die kontinentaleuropäischen Mächte übte Großbritannien in seinen amerikanischen Kolonien kaum direkte Regierungsgewalt aus. Und der privat praktizierende Notar vor allem französischer und holländischer Prägung wurde nicht, wie man erwarten könnte, durch den englischen *notary*

public ersetzt, wie man ihn seit dem Mittelalter kannte; vielmehr faßte dieser schon in den britischen Kolonien nicht Fuß, da ihm ein dem englischen vergleichbares Arbeitsfeld dort fehlte. Hingegen hatte es den amerikanischen "notary public" im oben beschriebenen Sinne bereits in der englischen Kolonialzeit gegeben. Er erhielt sich auch nach der Unabhängigkeit sowie, mit langsam abnehmenden Befugnissen, bis heute.

Eine Ausnahme bildete lediglich Louisiana (und in Kanada Quebec). Dort behauptete sich das *civil law* und mit ihm auch der *civil law notary*. Obwohl er - damals wie heute - kein studierter Jurist sein mußte, war er ein öffentlich bestellter Amtsträger mit erheblichen juristischen Kenntnissen sowie weitreichenden und wichtigen Beurkundungsaufgaben. Insbesondere stand und steht ihm die Befugnis zur Errichtung von "authentic acts" zu, denen Beweiskraft für ihren Inhalt zukommt. Allerdings hat das Notariat in Louisiana im Laufe der Zeit unter fortschreitender Erosion gelitten. Zum einen haben Befugnisse und Bedeutung der Notare dort allmählich abgenommen, zum anderen ist der Berufsstand zunehmend mit der Anwaltschaft verschmolzen. Dadurch wurde insbesondere die Stellung des Notars als unabhängiger Berater beider Parteien erheblich beeinträchtigt. Trotzdem hat sich die kontinentaleuropäische Tradition des Notariats in Louisiana jedenfalls noch zum Teil erhalten.

III. Die Gegenwart: Der Notar kehrt zurück

Gegen Ende des 20. Jahrhunderts erlebte der *civil law notary* in den Vereinigten Staaten eine überraschende Renaissance - allerdings nicht aus Begeisterung für die Institution an sich, sondern aus reiner Notwendigkeit. Durch die starke Einwanderung aus Lateinamerika und die sich verstärkenden Wirtschaftsbeziehungen mit dieser Region ergab sich eine wachsende Vielzahl von Rechtsfällen zwischen den Vereinigten Staaten einerseits und Mittel- sowie Südamerika andererseits. Dadurch rückte ein Problem immer mehr in den Vordergrund: in den USA erstellte Urkunden (Verträge, Testamente, Anerkennungs- oder Verzichtserklärungen usw.) konnten in lateinamerikanischen Staaten oft nicht anerkannt werden, weil sie nicht notariell beurkundet bzw. beglaubigt waren. Um diesem Mißstand abzuhelfen, führten Florida und Alabama 1997 den *civil law notary* gesetzlich ein. Kandidaten müssen als Rechtsanwalt zugelassen sein, fünfjährige Erfahrung nachweisen und eine besondere Notarprüfung ablegen. Nach ihrer Ernennung sind sie sodann kraft einzelstaatlichen Rechts befugt, "authentic acts" zu erstellen, d.h. mit öffentlichem Glauben versehene Beurkundungen vorzunehmen, die dann auch in Lateinamerika anerkennungsfähig sind.
Damit gleichen diese *civil law notaries* den kontinentaleuropäischen und lateinamerikanischen Notaren in wichtigen Punkten. Trotzdem bestehen erhebliche Unterschiede. Zum einen sind Anzahl, Verteilung und Gebühren der *civil law notaries* in Florida und Alabama ganz dem freien Markt überlassen. Zum anderen ist ihre Tätigkeit fast ausschließlich auslandsbezogen, denn im Inland kann man mit ihnen aus noch zu erläuternden Gründen (s.u. IV.) kaum etwas anfangen. Eigenartigerweise ähneln sie darin den englischen *notaries public*.

Nach den bisherigen Erfahrungen hat sich das Modell bewährt. Andere Staaten erwägen, es ebenfalls einzuführen. Gleichwohl wird der *civil law notary* wegen der Auslandsbezogenheit

seiner Tätigkeit in den USA wohl ein eng spezialisierter und in Zahl und Bedeutung beschränkter Berufsstand bleiben. Sein Aufstieg zum vollwertigen Gegenstück des kontinentaleuropäischen oder lateinamerikanischen Notars ist nicht zu erwarten.

IV. Tieferliegende Problemschichten: Der *civil law notary* im US-amerikanischen Umfeld

Wie zu erwarten, ist das Schicksal des *civil law notary* in den Vereinigten Staaten in seinem Kommen und Gehen (und sogar in seiner Wiederkehr) eng mit dem Schicksal des *civil law* selbst verbunden. Man kann deshalb die Frage, warum der Notar in den USA den Sieg des common law im 19. Jahrhundert nicht überlebt hat, einfach damit beantworten, daß er eben nicht Teil der anglo-amerikanischen Rechtstradition ist. Diese Antwort ist allerdings verkürzt. Denn viele andere Elemente des *civil law* sind durchaus in den USA entweder über- oder später neu aufgenommen und in die Rechtslandschaft integriert worden. Warum hätte das nicht auch für das Institut des Notariats gelten können?

Eine genauere Betrachtung zeigt, daß dieses Institut mit dem amerikanischen Umfeld - sowohl dem rechtlichen als auch dem gesellschaftspolitischen - in grundsätzlichem Widerstreit lag bzw. liegt. Die Gründe dafür sind materiellrechtlicher, prozessualer, rechtskultureller und historischer Natur.

Aus materiellrechtlicher Sicht ist ein Notariat in den Vereinigten Staaten (und im common law überhaupt) schlichtweg unnötig. Da es keine notarielle Beurkungspflicht gibt, braucht man auch keine Notare. Deshalb sind auch die neuen *civil law notaries* in Florida und Alabama für einheimische Zwecke nicht notwendig.

Prozessual gesehen ergibt ein Notariat im amerikanischen Umfeld ebenfalls wenig Sinn. Denn der amerikanische Zivilprozeß verweigert notarieller Beurkundung nicht nur den erhöhten Beweiswert, der schließlich ihren hauptsächlichen Nutzen ausmacht. Seine ausgeprägte Mündlichkeit (und insbesondere die Schlüsselrolle der Jury, vor der alles mündlich verhandelt werden muß) macht sogar die Benutzung jeglicher Urkunden zu Beweiszwecken schwierig und in vielen Fällen sogar unmöglich. Jedenfalls vor Gericht kann man deshalb mit einer notariellen Urkunde nur wenig ausrichten.

Zudem liegt das Notariat in rechtskulturellem Widerspruch zum common law. *Civil lawyers* sind an Theoriebildung und Gesetzgebung gewöhnt; sie neigen deshalb dazu, Rechtsprobleme vorausplanend zu lösen. Genau das ist Aufgabe und Funktion des Notars. Im Gegensatz dazu denken anglo-amerikanische Juristen vor allem in Kategorien gerichtlicher Streitentscheidung. Sie ziehen es deshalb vor, das Auftreten von Problemen erst einmal abzuwarten, bevor sie es - sozusagen im nachhinein - juristisch bewältigen. Aus dieser, reaktiven, Sicht ist der vorausplanende Notar, dessen Beurkundung dann auch die Gerichte mehr oder weniger binden soll, ein Kuriosum.

Schließlich widersprach der Notar auch den berufs- und gesellschaftspolitischen Vorstellungen, die insbesondere das 19. Jahrhundert in den Vereinigten Staaten prägten. Die sehr offene, von Demokratiebegeisterung, Egalitarismus und Pioniergeist geprägte Gesellschaft der Zeit stand der staatlichen Ernennung von Amtsträgern ebenso kritisch gegenüber wie privilegierten Berufsständen. Zudem vertrug sich der Notar schlecht mit der vorherrschenden Sicht des common law als einer autonomen Privatrechtsordnung. Durch sie sollten Marktgesellschaft und eigenverantwortliche Bürger ihre Angelegenheiten möglichst ohne staatliche Regulierung selbst regeln. Der Notar aber verkörperte als öffentlicher Amtsträger, der zwingend an wichtigen Rechtsgeschäften zu beteiligen war, die staatliche Einmischung in private Angelegenheiten, gegen die sich viele amerikanische Zeitgenossen so entschieden wehrten. Aus dieser Sicht war der Notar ein Repräsentant der Obrigkeit des *ancien regime*, der nicht in die freiheitliche Rechtswelt der Vereinigten Staaten paßte.